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In The

Supreme Court of the United States

MICHAEL J. ROSSI, d.b.a. InternetMovies.com,

Petitioner,

v.

MOTION PICTURE ASSOCIATION OF AMERICA, INC.; HEMANSHU NIGAM, Director, Worldwide Internet Enforcement; and DOES 1-5, inclusive,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Ninth Circuit

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Whether or not the "good faith belief" provision[1] in the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 512(c)(3)(A)(v), requires a copyright holder to conduct a reasonable investigation to establish *actual* infringement prior to sending a shut-down notice to an ISP [Internet Service Provider], and whether or not a "reasonable investigation" is in fact conducted when a computer program and/or cursory human review is used to identify alleged copyright violators.

Whether the Ninth Circuit Court of Appeals is correct in ruling that the "good faith belief" provision in the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 512(c)(3)(A)(v), encompasses a subjective rather than an objective standard of review prior to infringing First Amendment rights.

Whether shut-down orders issued pursuant to the Digital Millennium Copyright Act of 1998 must provide actual notice of the statutory right to challenge the order in order to satisfy due process requirements.

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[1] According to 17 U.S.C. § 512(c)(3)(A), notification of a claimed infringement of copyright laws must be a written communication that includes a statement that the complaining party **"has a good faith belief that the use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law."**

PARTIES TO THE PROCEEDING

The following, and no others, are parties to the instant proceedings:

Petitioner MICHAEL J. ROSSI, d.b.a. INTERNET-MOVIES.COM, who was the Plaintiff and Appellant in the courts below.

Respondents are the MOTION PICTURE ASSOCIATION OF AMERICA, INC.; HEMANSHU NIGAM, Director, Worldwide Internet Enforcement; and DOES 1-5, inclusive, each of whom were the Defendants and Appellees in the courts below.

TABLE OF CONTENTS

	Page
QUESTIONS PRESENTED	i
PARTIES TO THE PROCEEDING	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
PETITION FOR WRIT OF CERTIORARI	1
I. CITATIONS TO OPINIONS BELOW	1
II. JURISDICTIONAL STATEMENT	1
III. CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED	2
IV. STATEMENT OF THE CASE	3
V. REASONS FOR GRANTING THE PETITION	7
A. Summary of Argument and Introduction	7
B. The "Good Faith Belief" Standard Established By The Ninth Circuit With Respect To The DMCA's Take-Down Notices Conflicts With the Same Standard Uniformly Applied In Other Areas Of Jurisprudence	7
VI. CONCLUSION	14
APPENDIXES	App. 1

TABLE OF AUTHORITIES

Page

FEDERAL CASES

Alandale Mutual Ins. Co. v. Excess Ins. Co., 992 F.Supp. 278 (1998) 11

ALS Scan, Inc. v. Remarq Communities, 139 F.3d 619 (4th Cir. 2001) 4

E.S. Originals Inc. v. Stride Rite Corp., 656 F.Supp. 484 (S.D.N.Y. 1987) 11

Inter'l Star Class Yacht Racing Assoc. v. Tommy Hilfiger USA, Inc., 80 F.3d 749 (1996) 11

Rossi v. Motion Picture Association of America Inc., et al., 391 F.3d 1000 (9th Cir. 2004) 1, 7

Rossi v. Motion Picture Association of America Inc., et al., Docket No. CV-02-00239-BMK, 2003 WL 21511750 ..... *passim*

View Engineering, Inc. v. Robotic Vision Systems, Inc., 208 F.3d 981 (Fed. Cir. 2000) 13, 14

Waters v. Churchill, 511 U.S. 661, 114 S.Ct. 1878, 128 L.Ed.2d 686 (1994) 11

W.W.W. Pharmaceutical Co., Inc. v. Gillette Co., 984 F.2d 567 (2d Cir. 1993) 11

STATE CASES

New York University v. Continental Ins. Co., 87 N.Y.2d 308, 639 N.Y.S.2d 283, 662 N.E.2d 763 (1995) 11

TABLE OF AUTHORITIES – Continued

Page

FEDERAL STATUTES

Digital Millennium Copyright Act of 1998, 17 U.S.C § 512 ..... *passim*

15 U.S.C.A. §§ 1125, 1127 11

28 U.S.C. § 1291 .....

28 U.S.C. § 2201 1

28 U.S.C. § 1331 1

28 U.S.C. §§ 1343(a)(3) and (4) 1

FRCP Rule 1 2

FRCP Rule 4(a) 2

FRCP Rule 11 ..... 11, 13

OTHER AUTHORITIES

Bleyer, Willard Grosvenor, Ph.D., *Main Currents in the History of American Journalism*, Houghton Mifflin Co. (1927) 8, 9

Lanham Trade-Mark Act, §§ 43(a), 45, as amended 11

PETITION FOR WRIT OF CERTIORARI

Petitioner respectfully seeks certiorari to review the Opinion by the Ninth Circuit Court of Appeals entered on December 1, 2004.

I.

CITATIONS TO OPINIONS BELOW

The Opinion of the Ninth Circuit Court of Appeals is found at Docket No. 03-16034, *Rossi v. Motion Picture Association of America Inc., et al.*, 391 F.3d 1000 (9th Cir. 2004) [*App. 1*], and the *Order Granting Defendants' Motion for Summary Judgment* issued by the District of Hawaii is found at Docket No. CV-02-00239-BMK, 2003 WL 21511750 [*App. 14*]. The pertinent rulings appear in the attached appendix at the page numbers noted.

II.

JURISDICTIONAL STATEMENT

The District Court for the District of Hawaii had subject matter jurisdiction pursuant to 28 U.S.C. Section 1331, 1343(a)(3) and (4), this being an action arising under the federal constitution and laws, and under 28 U.S.C. §§ 2201 and 2202, this being an action for declaratory relief.

Plaintiff Rossi filed his original diversity complaint on April 25, 2002, alleging various tort claims against Defendants MPAA, et al., for their conduct in shutting down his internet website, known as InternetMovies.com, pursuant to the Digital Millenium Copyright Act of 1998 (DMCA), 17 U.S.C. § 512. An *Order Granting Defendants' Motion for*

Summary Judgment was entered in favor of Defendants on the April 29, 2003. [*App. 14*] Judgment was entered in favor of Defendants and against Plaintiff on the entire action on May 2, 2003.

Plaintiff Rossi filed his Notice of Appeal on May 29, 2003, over which the Ninth Circuit had jurisdiction pursuant to 28 U.S.C. § 1291, and Federal Rules of Appellate Procedure Rules 1, 4(a), since the Order appealed from was a final order of judgment in favor of the defendants as to the entire action. The Ninth Circuit Court of Appeals entered its Opinion affirming the District Court on December 1, 2004. [*App. 1*]

III.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The First Amendment to the United States Constitution:

> Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the government for a redress of grievances.

The Fourteenth Amendment to the United States Constitution, Section 1:

> Section 1. All persons born or naturalized in the United States and subject to the jurisdiction thereof, are citizens of the United States and of the state wherein they reside. No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of

> life, liberty, or property, without due process of law; nor deny to any person within the jurisdiction the equal protection of the laws.

Digital Millennium Copyright Act of 1998, 17 U.S.C. § 512(c), (d), (f), and (g):

> See Appendix.

IV.

STATEMENT OF THE CASE

Michael Rossi, d.b.a. InternetMovies.com, had his website shut down by Respondents Motion Pictures of America Inc., et al. (MPAA) for alleged copyright violation pursuant to the Digital Millennium Copyright Act of 1998, 17 U.S.C. § 512(c)(3)(v) (DMCA). By his lawsuit, Mr. Rossi contends that under the circumstances, the MPAA could not have, as a matter of law, acted reasonably in shutting down his website because the level of "investigation" undertaken by the MPAA to form the "good faith belief" required by the DMCA was inadequate.

InternetMovies.com, for example, was cited in 2001 for making available illegal downloads of the third installment of "The Lord of the Rings", even though that movie was not even completed until two years later, in 2003. Had the MPAA done any objectively minimal level of investigation, it would have discovered the truth, that there were no illegal downloads available and that there was no copyright violation occurring – a fact no longer disputed.

InternetMovies.com was conceived as an "online magazine", to promote information about movies and who was putting movies out on the internet, and providing a

graphical directory for people to easily see a compilation of all movies and information available on the internet. *Rossi Depo., p. 12-13, 114, 183* [ER: 00178-179, 00076, 145, 178-179, 204, 243]. As stated by the trial court, the website is described as "an online directory of artists' works and an internet news magazine providing information and resources about movies on the internet." [ER: 00384-00385]

As with any magazine that publishes information about the activities of others, Mr. Rossi asserts that he has a First Amendment right to compile and present all information about movies on the internet. *See, e.g., ALS Scan, Inc. v. Remarq Communities*, 139 F.3d 619 (4th Cir. 2001). And it's true, there are movies available over the internet to download, including authorized releases, independent films, trailers, and, in all likelihood, unauthorized copies.

At the time of the MPAA's actions against him, in March and April of 2001, Rossi did not, and did not purport to, monitor or edit or review any or all of the sites of which he compiled a directory. *Rossi Depo., pp. 114-115* [ER: 204-205]. Furthermore, he testified that, with the exception of one offered by a studio, he did not ever try to download a movie from any sites claiming to offer them. *Rossi Depo., p. 52* [ER: 191].

In essence, his site was the equivalent of providing general information for other web sites, compiling a directory of what other people claimed to have available online, including independent films and trailers. *Rossi Depo., pp. 12-13* [ER:176-177]. Plaintiff Rossi did not ever offer any movies for download from his site, contrary to the MPAA's express statements to the contrary in their violation letters, and in fact he could not have done so

given the server space available for his site at that time. *See, Stmt. Of Genuine Issues, Nos. 6, 25* [ER: 134, 139].

The MPAA learned about plaintiff's website through a communication from Warner Bros./Time Warner AOL's Marc Brandon, *Jacobsen Depo. p. 11-12, 15* [ER: 144-145, 147-148,] and Mr. Jacobsen stated in his deposition that they confirmed the website through its "Ranger" program. *Jacobsen Depo., p. 11-12* [ER: 144-145, 147-148]. Other than capturing the image of one page of the site (not the home page), "xindex.html", the MPAA did absolutely no further investigation into the site prior to sending its standard form violation and shut-down letter on March 23, 2001. *Genuine Issue, No. 23* [ER: 138-139]. This is the norm for MPAA investigations: According to Mr. Jacobsen, who testified on behalf of the MPAA in this matter, the MPAA sent out 160,000 cease and desist letters in 2002, and 54,000 in 2001. *Jacobsen Depo., p. 48* [ER: 161]. With a *total* of 3-4 employees reviewing the Ranger program's hundreds of thousands of "hits", that allows very little time to be spent "investigating" each alleged violation. *Jacobsen Depo., pp. 16-17* [ER: 148-149].

The MPAA never actually tried to download a movie, never tried any of the supposed links, never called the ISP to check the capacity of the site, and failed to note that the alleged offending "text box" with a list of movies did not hyperlink to any sites, just identified trailers, and did not offer downloads. *Genuine Issues, No. 23, 25* [ER: 138-140]. In their memorandum, the MPAA indicates that it simply "believ[ed], as did some of plaintiff's members", that copyrighted movies could be downloaded from plaintiff's site, but it did nothing to verify that erroneous belief until after it sent the shut-down letter. *Id.*

Rossi contends that the letters sent by the MPAA to the ISP and to Plaintiff, on March 3, 2001, April 3, 2001, and April 16, 2001, and publicized to various other industry members, *Jacobsen Depo., Exhibits 1-2* [ER: 264-265]; *Stmt. Of Facts, Exhibits C-G* [ER: 175-266], was inaccurate in that no copyrights were being infringed by plaintiff's web site and one could not download from the site, and therefore the MPAA's alleged technical "compliance" with the requirements of the DMCA is irrelevant because the "good faith belief" was lacking.

The MPAA contended in the courts below that Mr. Rossi's letter denying the allegations was inadequate to satisfy the "counter-notification" provision of the DMCA. 17 U.S.C. § 512(g)(3). However, Mr. Rossi *did* notify his Internet Service Provider that he was not violating any copyright laws and that one could not download movies from his web site, and asked the ISP not to take down his site. *Stmt. Of Genuine Issues, No. 4* [ER: 133]. When the owner of the ISP telephoned the MPAA and made this assertion, however, the MPAA rejected it entirely and sent Mr. Wong a follow-up letter stating that he was *required* to disable access to the site, Mr. Rossi's denial notwithstanding. Unfortunately, the owner of the ISP professed to be quite frightened of the MPAA and shut down the site, ignoring Mr. Rossi's assertions. *Wong Depo., pp. 29-31, 36* [ER: 170-172, 173].

While the Digital Millennium Copyright Act provides certain required elements for a "proper" counter-notification, 17 U.S.C. § 512(f), neither Mr. Rossi, who is not an attorney, nor the ISP, were ever given any notice of any statutory right to challenge the MPAA's violation letter. *Jacobsen Declaration* [ER: 19-21]; [ER: 036-046, 139]; *Exhibits C-G* [ER: 175-266]; *Stmt. Of Genuine Issues,*

No. 24 [ER: 139]. Nonetheless, Mr. Rossi's letter to Mr. Wong fulfills the essence of the counter-notification requirements, with the exception of the express consent to local federal court jurisdiction. *Jacobsen Depo., Exhibit 4; Wong Depo., Exhibit 3* [ER: 143-164].

V.

REASONS FOR GRANTING THE PETITION

A. Summary of Argument and Introduction

There are few topics more hotly contested today than the fight between copyright protections and First Amendment protection. In this case, copyright holders have been allowed to prevail with barely more than a suspicion that their copyrights are being violated. In its decision below, the Ninth Circuit held that, "[m]easuring compliance with a lesser 'objective reasonableness' standard would be inconsistent with Congress's apparent intent that the statute protect potential violators from *subjectively* improper actions by copyright owners." 391 F.3d at 1005 (emphasis in original) [*App. 9*].

Copyright violation may or may not be, in the words of the "Copyright *Amici*", "rampant on the internet". Whether it is or isn't is largely irrelevant, however, since Plaintiff Michael Rossi did not in fact violate any copyright laws, and, other than being shut down by his Internet Service Provider under threats from the MPAA, has not been sued for any such alleged violation. Mike Rossi's website was, and is simply an on online magazine.

When *Popular Science*™ magazine advertised loudly and with great hyperbole on its cover that every family could soon have its own nuclear-powered aircraft, most

people do not assume that they can run out and buy one, a reality confirmed by reading the text of the magazine. Similarly, when InternetMovies.com juxtaposed the claim that there existed on the internet movies available for download with photos of current movies, a simple click on the site (akin to opening and reading the magazine) would have revealed the reality.

What *is* rampant right now is a state of industry panic over the perception of possible lost profits, that has led to the filing of an overwhelming number of actions against alleged violators, even those whose names are unknown. No civil action was filed against Mr. Rossi, however his website was shut down without any due process at all – he was not even notified that he had a right to bring a statutory challenge to the shut down notice. This rampant panic has led to the erosion of basic, established rights that exist to protect individuals in this country from just such unproven, subjective attacks.

The current atmosphere with regard to internet copyright issues is reminiscent of the days of the suppression of the early newspapers, and such coercive measures as the Stamp Act, which taxed newspapers according to their size and the number of advertisements, and required the name of the publisher to be printed on every copy. Bleyer, Willard Grosvenor, Ph.D., *Main Currents in the History of American Journalism*, pp. 79-82 Houghton Mifflin Co. (1927). So effective were the protests against the Stamp Act that the colonists, publishers, and public leaders came to realize the value of the press in shaping public opinion.

For a group of Patriots, including Samuel Adams, James Otis, Joseph Warren, Josiah Quincy, Samuel

Cooper, and John Adams, the *Boston Gazette* became their mouthpiece. Loyalists, on the other hand, such as Governor Hutchinson's brother-in-law and Lieutenant Governor after 1771, Andrew Oliver, found the press to be "treasonable and seditious", and wrote that "If there be no way to take off the original incendiaries [by sending them to England, as was proposed, to be tried for treason], they will still continue to instil poison into the minds of the people through the vehicle of the *Boston Gazette*." *Id.*

As stated by the trial court, InternetMovies.com is described as "an online directory of artists' works and an internet news magazine providing information and resources about movies on the internet." [ER: 00384-00385]. In essence, Mr. Rossi's website was similar to any printed newspaper, which reported on and in some cases advertised that which purported to be available on the internet with respect to movies. In fact it was not possible to download movies from Mr. Rossi's site, and there is no evidence (other than advertising claims) that the sites to which a person could link from Mr. Rossi's site in fact contained copyrighted materials.

The MPAA admits that it made *no* attempt to determine whether or not the links in fact led to copyright violations, and Mr. Rossi testified that his site was the equivalent of providing general information for other web sites, compiling a directory of what other people *claimed* to have available online, including independent films and trailers that were certainly not violating any copyright. *Rossi Depo., pp. 12-13* [ER: 176-177; ER: 134, 139].

B. The "Good Faith Belief" Standard Established By The Ninth Circuit With Respect To The DMCA's Take-Down Notices Conflicts With the Same Standard Uniformly Applied In Other Areas Of Jurisprudence

In other areas of the law where a "good faith belief" is that standard used to measure the reasonableness of conduct, the courts have required that the belief be objectively reasonable. With regard to the Digital Millennium Copyright Act, the Ninth Circuit has diminished that standard and chilled First Amendment rights by requiring nothing more than a subjective belief that a copyright violation might possibly be occurring.

In granting summary judgment in favor of the MPAA in this matter, the trial court simply held that "the DMCA only requires a copyright holder to form a "good faith belief" of an alleged or 'claimed' infringement prior to sending an ISP a notice." [*App. 20*] "The fact that a further investigation may have revealed that movies could not actually be downloaded does not alter the conclusion." [*App. 20*] As phrased by the District Court of Hawaii, the primary issue on appeal was whether or not the "good faith belief" provision in the DMCA, 17 U.S.C. § 512(c)(3)(A)(v), "requires a copyright holder to conduct an investigation to establish *actual* infringement prior to sending a notice to the ISP [Internet Service Provider]." [*App. 20* (emphasis added)]

In order to have a "good faith belief" in common sense usage, one has to have a "starting point" from which one is able to believe, i.e., an indication that the circumstances are based in fact. In general, a "good faith belief" requires that one has made a meaningful effort to investigate, although one need not know the truth with absolute certainty.

As far as is known to the undersigned counsel, there are no cases directly discussing the meaning of "good faith belief" with respect to its use in the Digital Millennium Copyright Act. Hence, one turns to the standards for "good faith belief" in other areas of law. For all practical purposes, the legal definition of good faith in patent, trademark, "covenant of good faith", and FRCP Rule 11 motions, is a belief based upon a reasonable investigation. *See, e.g., Waters v. Churchill*, 511 U.S. 661, 114, S.Ct. 1878, 1889 (1994); *New York University v. Continental Ins. Co.*, 87 N.Y.2d 308, 318, 639 N.Y.S.2d 283, 662 N.E.2d 763 (1995); *Alandale Mutual Ins. Co. v. Excess Ins. Co.*, 992 F.Supp. 278, 285 (1998).

In cases of trademark law, which has similar limitations codified regarding liability for materials online, certain standards have been established indicating that one can have a "good faith belief" without verifying the truth, but that one must at a minimum conduct a reasonable investigation. According to the Lanham Trademark Act, "good faith can be found if one has selected a mark which reflects the product's characteristics and one has requested a trademark search or relied on the advice of counsel which revealed no other use of the mark". Lanham Trade-Mark Act, §§ 43(a), 45, as amended, 15 U.S.C.A. §§ 1125(a), 1127; *W.W.W. Pharmaceutical Co., Inc. v. Gillette Co.*, 984 F.2d 567, 575 (2d Cir. 1993); *E.S. Originals Inc. v. Stride Rite Corp.*, 656 F.Supp. 484, 490 (S.D.N.Y. 1987).

The failure to run a trademark search prior to adopting the disputed name constitutes willful ignorance and bad faith. *Internat'l Star Class Yacht Racing Assoc. v. Tommy Hilfiger, USA, Inc.*, 80 F.3d 749, 752 (1996). Thus in order to achieve a "good faith belief" it is insufficient that one only

believes or rather wishes to know a certain fact. One rather has to have a firm basis in which to ground the belief.

As in the matter of trademarks, the starting point for determining a copyright violation has to reflect the purpose or the meaning of the law in issue. In cases of trademarks the purpose is to protect one's trademark from the use of the same mark by another party. In the matter of claimed copyright infringements concerning material online, the purpose of the law is to protect one's copyrights from the unauthorized use of others. As stated in 17 U.S.C. § 512(c)(3)(A)(v) one has to have a "good faith belief" that the material is actually being used by an unauthorized person, and that such use of the material in the manner complained of is not authorized by copyright owner.

Thus, in accordance to the said above, there has to be a starting point which indicates that the use of the material is not authorized by the copyright owner. In order to have a "good faith belief", one has to have an indication worth enough to rely upon, not just one's impression. And in accordance to the established standards in trademark law there has to be a certain amount of research concerning (1) the use of the material, and (2) the missing authorization by the copyright owner.

As in the matter of trademark search only the belief of an unauthorized use cannot be enough in order to indicate good faith. It rather speaks for willful ignorance and bad faith if the party does not try to verify its accusations, just as it is not enough to believe that there are no other trademarks without trying to find out if there were any. For the same reason it cannot be sufficient in order to have a "good faith

belief" to allege that a website claims to have movies to download, without even trying to verify the statement.

This understanding of good faith is parallel to the requirements of good faith needed to support a request for sanctions under Rule 11 of the Federal Rules of Civil Procedure. "Rule 11 imposes a duty on attorneys to certify that they have conducted a **reasonable inquiry** and have determined that any papers filed with the court are well grounded in fact . . .", *View Engineering, Inc. v. Robotic Vision Systems, Inc.*, 208 F.3d 981, 984 (Fed. Cir. 2000) (emphasis added).

In the area of patent law, mere "advertising" (much like Rossi's website) was held insufficient to support a "good faith belief" of infringement for Rule 11 (sanctions) purposes, even when coupled with knowledge of the patents and statements made about the allegedly infringing device:

> At the time the counterclaims were filed, the only basis for their filing was the belief of Howard Stern that the View devices probably infringed the Robotic patents. This belief, in turn, was based solely on his knowledge of the Robotic patents, View's advertising, and the statements View made to its own customers. Howard Stern never had physical access to any of the View machines before the filing of the 120 counterclaims of infringement of eight patents.

View Engineering, Inc. v. Robotic Vision Systems, Inc., 208 F.3d 981, 984-985 (Fed. Cir. 2000).

To properly investigate prior to filing a claim so as to avoid sanctions, the court held:

> This entails, "at a bare minimum, apply[ing] the claims of each and every patent that is being brought into the lawsuit to an accused device and conclude that there is a reasonable basis for a finding of infringement of at least one claim of each patent so asserted."

View Engineering Inc. v. Robotic Vision Systems, Inc., 208 F.3d 981, 986 (Fed. Cir. 2000), cited in, *Network Caching Technology, LLC v. Novell, Inc.*, 2003 WL 21699799, *6 (N.D.Cal. 2003).

Applying a similar standard to the DMCA, even a minimal investigation would have shown that there was no copyright violation by Mr. Rossi's website, and the frenzy of the "war on digital copyright" should not be allowed to eviscerate the large body of precedent interpreting analogous "good faith belief" provisions as requiring *objective* "good faith belief" before a business is shut down, nor to prevail over a publisher's First Amendment rights.

VI.

CONCLUSION

In today's world, web pages on the internet are the newest technological variation on the traditional printing press, used for publishing news and such. Shutting down a newsmagazine-style internet site, therefore, is akin to shutting down a printing press.

Rossi argues that there was no "good faith belief" sufficient to justify shutting down his internet site than there would be for shutting down a newsmagazine just because its cover suggested that it might contain material

that violated copyright, particularly if a simple *look* inside would show that such was not the case.

The phrase "good faith belief" is much used in American jurisprudence, and is generally defined either explicitly or implicitly as the formation of the belief *by reasonable investigation*. The MPAA is a large, well-funded organization that devotes itself in substantial part to shutting down copyright violations.

If it is the MPAA's role to police copyright violations for its members, then to what standard should it be held before making official accusations? As the self-designated leader in copyright enforcement, with unprecedented power under the DMCA to shut down critics or competitors, never mind actual copyright violators, the MPAA should surely be held to higher standards in exercising its power to shut down internet sites and chill First Amendment rights than that established as precedent by the Ninth Circuit in this case, particularly when that precedent conflicts with the same legal standard well established in other areas of jurisprudence.

Based on all of the foregoing, Petitioner respectfully submits that a grant of certiorari is appropriate in this vital matter to define the proper balance between the conflicting rights of copyright holders and those exercising their First Amendment right to freedom of speech, in the forum known as the internet.

DATED: February 28, 2005

Respectfully submitted,

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391 F.3d 1000

United States Court of Appeals,
Ninth Circuit.

Michael J. ROSSI, dba Internet Movies.Com,
Plaintiff-Appellant,

v.

MOTION PICTURE ASSOCIATION OF
AMERICA INC.; et al., Defendants-Appellees.
No. 03-16034.

Argued and Submitted May 4, 2004.
Filed Dec. 1, 2004.

James H. Fosbinder, Fosbinder & Fosbinder, A Law Corporation, Kahului, Hawaii, for the plaintiff-appellant.

Russell J. Frackman and Elena Segal, Mitchell Silberberg & Knupp, LLP, Los Angeles, California, and Paul Maki, a Law Corporation, Honolulu, Hawaii, for the defendant-appellee.

Steven A. Marenberg, Irell & Manella, LLP, Los Angeles, California, for amici curiae American Federation of Musicians of the United States and Canada, et al.

James J. Halpert, Piper Rudnick, LLP, Washington, D.C., for amici curiae NetCoalition and Internet Commerce Coalition.

Appeal from the United States District Court for the District of Hawaii; Barry M. Kurren, Magistrate Judge, Presiding.[1] D.C. No. CV-02-00239-BMK.

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[1] The parties consented to trial before a magistrate judge.

Before: FARRIS, NOONAN, and RAWLINSON, Circuit Judges.

RAWLINSON, Circuit Judge:

We agree that no material issue of fact was raised regarding the Motion Picture Association of America's (MPAA) "good faith belief" that Rossi was infringing upon copyrighted materials. Because the MPAA's actions, compliant with the notice and takedown provisions of the Digital Millennium Copyright Act of 1998 (DMCA), 17 U.S.C. § 512, constitute "justification," were privileged and were not unreasonable, we affirm the district court's summary judgment in favor of the MPAA.

I. *BACKGROUND*

Michael J. Rossi has owned and operated the "internetmovies.com" website since 1997. Rossi described his website as an "online magazine" that provided visitors with a directory of websites containing information about movies. Beginning January, 2001, Rossi offered memberships to visitors to his website.

The MPAA is a trade association that works to prevent unauthorized copying, transmittal, or other distribution of the movie studios' motion pictures. An MPAA member became aware of Rossi's website and notified the MPAA. A subsequent examination of Rossi's website revealed the following contents: "Join to download full length movies online now! new movies every month"; "Full Length Downloadable Movies"; and "NOW DOWNLOADABLE." These statements were followed by graphics for a number of the MPAA's copyrighted motion pictures. After viewing the website, the MPAA believed that Rossi was

illegally infringing on its copyrighted materials.[2] The MPAA followed the "notice and takedown" procedures detailed in the DMCA[3] and sent several notices to Rossi and Rossi's Internet service provider (ISP) informing them of the asserted infringement.

After receiving notice from his ISP that his website would be shut down, Rossi found a new ISP to host internetmovies.com. According to Rossi, internetmovies.com was offline for "[a]pproximately 1 second to 72 hours," and the amount of money he lost due to the website's shutdown was "unmeasureable."

Rossi filed this diversity action asserting the following claims: 1) tortious interference with contractual relations; 2) tortious interference with prospective economic advantage; 3) libel and defamation; and 4) intentional infliction of emotional distress. The MPAA filed a motion for summary judgment, which the district court granted. *Rossi v. Motion Picture Ass'n of America, Inc.*, 2003 WL 21511750 (D.Haw.2003). The court held that the MPAA "had more than a sufficient basis to form the required good faith belief that [Rossi's] site contained infringing content prior to asking [the ISP] to shut down the site." *Id.* at *3. Since Rossi did not "raise a genuine issue of material fact with regard to [the MPAA's] compliance with the DMCA," the court granted the MPAA's motion for summary judgment on the tortious interference with contractual relations and the tortious interference with prospective economic advantage

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[2] The MPAA's initial investigation did not include an actual attempt to download any movies from Rossi's website or any of the website's accompanying links.

[3] *See* 17 U.S.C. § 512(c)(3)(A).

claims. *Id.* at *4. In disposing of the defamation claim, the court held that the MPAA's statements to Rossi's ISP "were a privileged publication." *Id.* Finally, the court granted summary judgment in favor of MPAA on the intentional infliction of emotional distress (IIED) claim. *Id.* at *5. The court found, as a matter of law, that the MPAA's notices to Rossi's ISP were "justified and reasonable" and therefore not outrageous. *Id.*

II. *STANDARDS OF REVIEW*

We review a district court's grant of summary judgment *de novo*. *Leever v. Carson City*, 360 F.3d 1014, 1017 (9th Cir.2004). "Viewing the evidence in the light most favorable to the non-moving party," we "must determine whether there are any genuine issues of material fact and whether the district court correctly applied the relevant substantive law." *Id.* (citation omitted). We review *de novo* the district court's interpretations of the Copyright Act. *Ellison v. Robertson,* 357 F.3d 1072, 1076 (9th Cir.2004).

III. *DISCUSSION*

A. "Good Faith Belief" under § 512(c)(3)(A)(v)

Title II of the DMCA contains a number of measures designed to enlist the cooperation of Internet and other online service providers to combat ongoing copyright infringement. *See* 17 U.S.C. § 512. "Title II preserves strong incentives for service providers and copyright owners to cooperate to detect and deal with copyright infringements that take place in the digital networked environment." H.R. Rep. 105-551, pt. 2, at 49 (1998). Title II also was intended to "balance the need for rapid response to potential infringement with the end-users [sic]

legitimate interests in not having material removed without recourse." Sen. Rep. No. 105-190 at 21 (1998). When a copyright owner suspects his copyright is being infringed, he must follow the notice and takedown provisions set forth in § 512(c)(3) of the DMCA, which provide in part:

> (A) To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following:
>
> (i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.
>
> (ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.
>
> (iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.
>
> (iv) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.
>
> (v) A statement that the complaining party *has a good faith belief* that use of the material in the

> manner complained of is not authorized by the copyright owner, its agent, or the law.

17 U.S.C. § 512(c) (emphasis added).

Rossi does not dispute that the MPAA complied with the notice and takedown provisions set forth in § 512(c)(3)(A)(i)-(iv). Rather, Rossi contends that the MPAA did not have sufficient information to form a "good faith belief" under § 512(c)(3)(A)(v) that Rossi was illegally infringing the MPAA's copyrights. Rossi urges us to adopt a rule that in order to have "a good faith belief" of infringement, the copyright owner is required to conduct a reasonable investigation into the allegedly offending website.

It is undisputed that MPAA did not attempt to download any movies from Rossi's website or any links to the site. Rossi contends that if MPAA had reasonably investigated the site by attempting to download movies, it would have been apparent that no movies could actually be downloaded from his website or related links. Rossi contends that if the MPAA had conducted such an investigation, it would have inevitably concluded that Rossi's website could not possibly have been providing a source for downloading movies. In short, Rossi's interpretation of the "good faith belief" requirement would impose an objective standard of review for gauging the reasonableness of the MPAA's conduct in notifying Rossi and his ISP of the allegedly infringing website.

MPAA counters that the "good faith belief" requirement is a subjective one. In support of its argument, the MPAA directs us to cases interpreting "good faith" as encompassing a subjective standard. MPAA also notes that Congress could have, but did not, expressly import a

specific objective standard or reasonable investigation requirement into § 512(c)(3)(A)(v).

Rossi's contention notwithstanding, interpretive case law and the statutory structure of § 512(c) support the conclusion that the "good faith belief" requirement in § 512(c)(3)(A)(v) encompasses a subjective, rather than objective, standard.[4] Although no federal court has yet interpreted the meaning of "a good faith belief" within the context of § 512(c), courts interpreting other federal statutes have traditionally interpreted "good faith" to encompass a subjective standard. *See e.g. Alvarez v. IBP, Inc.*, 339 F.3d 894, 910 (9th Cir.2003) ("[t]o satisfy [29 U.S.C.] § 260, a FLSA-liable employer bears the difficult burden of proving both subjective good faith and objective reasonableness") (citations omitted); *see also Austin v. McNamara*, 979 F.2d 728, 734 (9th Cir.1992) ("The legislative history of [42 U.S.C.] § 11112(a) indicates that its reasonableness requirements were intended to create an objective standard, *rather than* a subjective good faith standard.") (emphasis added); *Brooks v. Village of Ridgefield Park*, 185 F.3d 130, 137 (3rd Cir.1999) ("The good faith requirement is a subjective one that requires that the employer have an honest intention to ascertain and follow the dictates of the [Fair Labor Standards] Act. The reasonableness requirement imposes an objective standard by which to judge the employer's conduct.") (alterations and

[4] We are mindful of the "well-established rule of construction that where Congress uses terms that have accumulated settled meaning under the common law, a court must infer, unless the statute otherwise dictates, that Congress means to incorporate the established meaning of these terms." *Neder v. United States*, 527 U.S. 1, 21, 119 S.Ct. 1827, 144 L.Ed.2d 35 (1999) (alterations, citations, and internal quotation marks omitted).

internal quotation marks omitted). These cases demonstrate that the objective reasonableness standard is distinct from the subjective good faith standard, and that Congress understands this distinction. When enacting the DMCA, Congress could have easily incorporated an objective standard of reasonableness. The fact that it did not do so indicates an intent to adhere to the subjective standard traditionally associated with a good faith requirement.[5]

The overall structure of § 512 also supports the conclusion that § 512(c)(3)(A)(v) imposes a subjective good faith requirement upon copyright owners. *See Wilderness Soc'y v. United States Fish and Wildlife Serv.*, 353 F.3d 1051, 1060 (9th Cir.2003) (en banc), *amended by* 360 F.3d 1374 (9th Cir.2004) ("[I]t is also a fundamental canon[of statutory construction] that the words of a statute must be read in their context and with a view to their place in the overall statutory scheme.") (citation and internal quotation marks omitted). In § 512(f), Congress included an expressly limited cause of action for improper infringement notifications, imposing liability only if the copyright owner's notification is a knowing misrepresentation.[6] A copyright owner cannot be liable simply because an unknowing mistake is made, even if the copyright owner acted unreasonably in making the mistake. *See* § 512(f). Rather, there must be a demonstration of some actual

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[5] "Good faith" is "[a] state of mind consisting [of] . . . honesty in belief or purpose." *Black's Law Dictionary*, 701 (7th ed.1999).

[6] 17 U.S.C. § 512(f) provides that "[a]ny person who knowingly materially misrepresents . . . that material or activity is infringing . . . shall be liable for any damages . . . incurred by the alleged infringer . . . who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing."

knowledge of misrepresentation on the part of the copyright owner. *Id.*

Juxtaposing the "good faith" proviso of the DMCA with the "knowing misrepresentation" provision of that same statute reveals an apparent statutory structure that predicated the imposition of liability upon copyright owners only for knowing misrepresentations regarding allegedly infringing websites. Measuring compliance with a lesser "objective reasonableness" standard would be inconsistent with Congress's apparent intent that the statute protect potential violators from *subjectively* improper actions by copyright owners.

Applying the subjective good faith standard of § 512(c) and viewing the record in the light most favorable to Rossi, Rossi failed to raise a genuine issue of material fact regarding MPAA's violation of the DMCA. In reaching this conclusion, we examine: 1) the information residing on Rossi's website, and 2) MPAA's actions in response to the discovery of that information.

After one of the MPAA's member companies notified the MPAA's anti-piracy department of possible infringements on internetmovies.com, an MPAA employee reviewed the website.[7] The website contained statements

[7] Many anti-piracy departments use the "Ranger" program to detect websites containing potentially infringing material. Amici Curiae Net-Coalition and Internet Commerce Coalition contend that computers conducting automated searches cannot form a belief consistent with the language of the DMCA, because they cannot distinguish between infringing content and content that merely contains words that suggest infringement. Although the MPAA admitted that it relies heavily on "Ranger" to locate infringing websites, internetmovies.com was located and examined using human review. Even though the MPAA uses the "Ranger" program to initially identify potentially infringing websites,

(Continued on following page)

that included "Join to download full length movies online now! new movies every month"; "Full Length Downloadable Movies"; and "NOW DOWNLOADABLE." These representations on the website led the MPAA employee to conclude in good faith that motion pictures owned by MPAA members were available for immediate downloading from the website.[8] The unequivocal language used by Rossi not only suggests that conclusion, but virtually compels it. As the district court noted, "[t]here is little question that these statements strongly suggest, if not expressly state, that movies were available for downloading from the site." *Rossi*, 2003 WL at *3. In fact, Rossi even admitted that his own customers often believed that actual movies were available for downloading on his website.

Accordingly, Rossi has failed to raise a triable issue of fact as to whether the MPAA complied with the notice and takedown procedures set forth in § 512 of the DMCA. Given the explicit nature of the statements on Rossi's website, the district court properly found that no issue of material fact existed as to MPAA's "good faith belief" that Rossi's website was infringing upon its copyrighted materials.

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the MPAA employs three to four employees who actually review the identified sites. It is these employees, rather than "Ranger," who ultimately decide whether a website contains infringing material.

[8] There is no suggestion in the record that MPAA's belief regarding Rossi's asserted infringement was other than sincere.

B. State Tort Claims

Rossi's action in the district court asserted four state law torts; 1) tortious interference with contractual relations, 2) tortious interference with prospective economic advantage, 3) libel and defamation, and 4) intentional infliction of emotional distress (IIED). Because there is no genuine issue of material fact as to any of these claims, each must fail.

To establish a claim for tortious interference with contractual relations, Rossi must prove "the absence of justification on the defendant's part . . . " *Lee v. Aiu,* 85 Hawai'i 19, 936 P.2d 655, 668 (1997). Rossi must also establish the absence of justification to prevail on his intentional interference with prospective economic advantage claim. *See Kutcher v. Zimmerman,* 87 Hawai'i 394, 957 P.2d 1076, 1087 n. 15 (1998) (recognizing the tort of interference with prospective contractual relations as "a sub-species of the broader tort of interference with prospective economic advantage."). The MPAA's compliance with the notice and takedown procedures detailed in the DMCA, based on a "good faith belief" that Rossi's website was infringing on its copyrighted material, meet Hawaii's standards for "justification." *See id.* at 1088-90 (announcing standards).[9] The MPAA complied with its statutory obligations, its actions were apparently sincere and proper in means and purpose, and without further evidence of impropriety, we must find the MPAA's actions justified under the circumstances. *See id.* at 1089 (discussing

[9] The element of "justification" is functionally equivalent for both tortious interference with contractual relations and tortious interference with prospective economic advantage. *See Kutcher,* 957 P.2d at 1087 n. 15.

indicia of impropriety, including violations of statutes).[10] As a result, Rossi's interference claims fail as a matter of law.

Rossi's defamation claim suffers a similar fate. An otherwise defamatory statement is not actionable if "the author of a defamatory statement reasonably acts in the discharge of some public or private duty, legal, moral, or social and . . . the publication concerns a subject matter in which the author and the recipients of the publication have a correlative interest or duty." *Kainz v. Lussier,* 4 Haw.App. 400, 667 P.2d 797, 801 (1983) (citations omitted). This defense to defamation is a qualified privilege that is applicable only if it is demonstrated that "the publisher and recipient have a common interest and . . . the communication is of a kind reasonably calculated to protect or further such interest." *Id.* at 405, 667 P.2d 797 (citation omitted). Here, the MPAA (the publisher) and Rossi's ISP (the recipient) shared an interest in preventing the violation of copyright laws. As discussed above, the MPAA exercised its statutory rights and acted reasonably in communicating with Rossi's ISP about the allegedly infringing material on internetmovies.com. Accordingly, the MPAA's statements to Rossi's ISP were privileged.

Finally, in order to establish a claim for IIED, Rossi must prove that the MPAA's communications were "unreasonable or outrageous." *Lee,* 936 P.2d at 670 (alteration omitted). "An act is unreasonable if it is without just cause or excuse and beyond all bounds of decency." *Shoppe v.*

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[10] We do not interpret Hawaii law to state that compliance with statutes precludes a finding of lack of justification; only that the actions in this case were justified.

Gucci America, Inc., 94 Hawai'i 368, 14 P.3d 1049, 1068 (Haw.2000) (citations, internal quotation marks and emphasis omitted). The record reflects that the MPAA's actions were certainly not beyond all bounds of decency in communicating with Rossi and Rossi's ISP. Thus, the IIED claim must fail.

III. *CONCLUSION*

When considered in the context of informative case authority, the statutory structure of § 512(c) supports the conclusion that the "good faith belief" requirement in § 512(c)(3)(A)(v) encompasses a subjective, rather than objective, standard of conduct. Applying this subjective good faith standard and viewing the record in the light most favorable to Rossi reflects the absence of a genuine issue of material fact regarding MPAA's violation of the DMCA. Because the MPAA acted in compliance with the DMCA and was otherwise justified in its response to Rossi's website, Rossi's tortious interference claims must fail. Because the MPAA's communications were privileged and were well within the bounds of decency, his defamation and intentional infliction of emotional distress claims must fail as well. The district court properly entered judgment in favor of the MPAA.

AFFIRMED.

2003 WL 21511750 (D.Hawai'i), 67 U.S.P.Q.2d 1047

United States District Court, D. Hawai'i.
Michael J. ROSSI d/b/a Internetmovies.Com, Plaintiff,

v.

MOTION PICTURE ASSOCIATION OF AMERICA, INC. et al., Defendants.
No. Civ. 02-00239BMK.

Filed April 4, 2002.
April 29, 2003.

Rhonda M. Fosbinder, James H. Fosbinder, Fosbinder & Fosbinder, Kahului, HI, for Michael J. Rossi dba Internet Movies.Com, plaintiff.

Elise Owens Thorn, Edmunds Maki Verga & Thorn, Honolulu, HI, Paul Maki, Paul Maki Attorney at Law, A Law Corporation, Honolulu, HI, for Motion Picture Association of America, Inc., defendant.

Elise Owens Thorn, Paul Maki, (See above), for Hemanshu Nigam, Director, Worldwide Internet Enforcement, defendant.

ORDER GRANTING DEFENDANTS' MOTION FOR SUMMARY JUDGMENT

KURREN, Magistrate J.

Before the Court is the Motion Picture Association of America, Inc. ("MPAA") and Hemanshu Nigam's ("Nigam") (collectively "Defendants") motion for summary judgment pursuant to Rule 56(c) of the Federal Rules of Civil Procedure ("FRCP 56(c)"). The motion came on for hearing on April 29, 2003. After careful consideration of the parties'

arguments and submissions, the Court GRANTS Defendants' motion.

BACKGROUND

Michael J. Rossi ("Plaintiff" or "Rossi"), a resident of Maui, owns and operates the website "internetmovies.com." Plaintiff describes the website as an online directory of artists' works and an internet news magazine providing information and resources about movies on the internet. The MPAA is a trade association that, among other things, seeks to limit, on behalf of its members, unauthorized copying, transmittal and/or distribution of its members' motion pictures.[1] In 2001, Defendant Nigam served as the MPAA's director of worldwide internet enforcement.

In March of 2001, one of the MPAA's members asked the MPAA to examine internetmovies.com for allegedly infringing content. When the MPAA looked at the website, it contained the following statements: "Join to download full length movies online now! New movies every month"; "Full Length Downloadable Movies"; and "NOW DOWNLOADABLE" followed by graphics for the movies Hannibal, Cast Away and Chocolat among others. Based on these statements, the MPAA believed that Plaintiff's site was offering movies for downloading in violation of copyright laws that protect its' members' movies.

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[1] MPAA's members include Columbia Pictures Industries, Inc., Disney Enterprises, Inc., Metro Goldwyn-Mayer Studios, Inc., Paramount Pictures Corporation, TriStar Pictures, Inc., Twentieth Century Fox Film Corporation, United Artists Pictures, Inc., United Artists Corporation, Universal City Studios, LLP, and Time Warner Entertainment Company, LP.

Accordingly, on March 23, 2001, the MPAA sent a written notice to FlexNet, Inc. ("FlexNet"), Plaintiff's internet service provider ("ISP"), asking FlexNet to remove Plaintiff's website from its server because of the site's allegedly infringing content. The written notice stated that the request was being made pursuant to, and in accord with the provisions of the Digital Millennium Copyright Act ("DMCA"), 17 U.S.C. § 512.[2] A second notice was sent to FlexNet via fax and email on March 26, 2001. On April 3, 2001, the MPAA also provided written notice of the alleged copyright infringement via email to webmaster@internetmovies.com. Finally, on April 11, 2001, following a telephone conversation with FlexNet, Defendants followed-up with another written notice.

On Monday, April 16, 2001, FlexNet notified Plaintiff by email that his website would be shut down on Friday, April 20, 2001. FlexNet explained that site was being shut down because of notices received from the MPAA. Plaintiff immediately began searching for a new ISP. On April 20, 2001, after moving internetmovies.com to a new ISP, Plaintiff posted the following message:

> The MPAA (Motion Picture Association of America) has closed down InternetMovies.com one time so far, but we are not crying about it. We were down for one full second. We get our faces knocked in the dirt but we just pop right back up.

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[2] The DMCA, under some circumstances, limits the liability of certain entities for online copyright infringements. For purposes of this case, the relevant portion of the DMCA provides that an ISP may not be liable for a copyright infringement if the ISP, upon receiving proper notice of a claimed infringement, responds expeditiously to remove or disable access to, the material that is claimed to be infringing. *See* 17 U.S.C. § 512(c)(1)(C).

Plaintiff also asserted that he was being accused of "Unauthorized Distribution of Copyrighted Motion Pictures."

Rossi began selling memberships to internetmovies.com in January of 2001. During the first quarter of 2001, the website signed up approximately 100 members. After the MPAA notices were sent, membership to the site increased from 100 to 10,000 active members, eventually reaching approximately 40,000 members in total. Plaintiff's income from the site also increased. The income was approximately $3,275 in April 2001, $6,571 in May 2001 and $10,469 in June 2001.

On April 25, 2002, Plaintiff filed the instant action alleging the following causes of action: (1) tortious interference with contractual relations; (2) tortious interference with prospective economic advantage; (3) libel and defamation; and (4) intentional infliction of emotional distress. In addition, in a fifth cause of action, Plaintiff requests an injunction enjoining Defendants from further interfering with Plaintiff's business, internetmovies.com.

DISCUSSION

A motion for summary judgment may not be granted unless the court determines that there is no genuine issue of material fact and that the undisputed facts warrant judgment for the moving party as a matter of law. *See* Fed.R.Civ.P. 56(c). In assessing whether a genuine issue of material fact exists, courts must resolve all ambiguities and draw all factual inferences in favor of the non-moving party. *See Anderson v. Liberty Lobby, Inc.*, 477 U .S. 242, 255 (1986); *see also Cline v. Indus. Maint. Eng'g & Contracting Co.*, 200 F.3d 1223 (9th Cir.2000). In deciding a

motion for summary judgment, the court's function is not to try issues of fact, but rather, it is only to determine whether there are issues to be tried. *Anderson,* 477 U.S. at 249. If there is any evidence in the record from which a reasonable inference could be drawn in favor of the non-moving party on a material issue of fact, summary judgment is improper. *See T.W. Elec. Serv., Inc. v. Pacific Elec. Contractors Ass'n,* 809 F.2d 626, 631 (9th Cir.1987) (summary judgment must be denied if a rational trier of fact might resolve the issue in favor of the non-moving party).

1. *Tortious Interference with Contractual Relations and Tortious Interference with Prospective Business Advantage*

In his first cause of action, Plaintiff contends that when Defendants caused Flexnet to disrupt the operation of internetmovies .com, Defendants tortiously interfered with Plaintiff's contract with Flexnet. In his second cause of action, Plaintiff asserts that internetmovies.com was the first website of its kind on the internet. Thus, Plaintiff contends, he had "an identifiable prospective business advantage" in the internet marketplace which Defendants' interfered with when they caused FlexNet to shut down internetmovies .com.

Under Hawaii law, to establish a claim for tortious interference with contractual relations Plaintiff must prove: (1) the existence of a contract between himself and FlexNet; (2) Defendants' knowledge of that contract; (3) that Defendants intentionally induced FlexNet to breach the contract; (4) without justification; (5) that FlexNet subsequently breached the contract; (6) resulting in damages to Plaintiff. *See Lee v. Aiu,* 85 Hawaii 19, 32 (1997); *see also Spring Patients, Inc. v. Avon Rubber & Plastics, Inc.*, 183

F.Supp.2d 1198, 1210 (D.Haw.2001). To establish his tortious interference with prospective business advantage claim, Plaintiff must prove: (1) a prospective contractual relationship existed between himself and a third party; (2) that Defendants knew about this relationship; (3) and intentionally interfered with the relationship; (4) without proper justification; (5) causing the third party to fail to consummate the prospective contract with Plaintiff; (6) resulting in damage to Plaintiff. *See, e.g., Kutcher v. Zimmerman,* 87 Hawaii 394, 406 (Haw.App.1998); *see also Robert's Hawaii Sch. Bus, Inc. v. Laupahoehoe Transp. Co.*, 91 Hawaii 224, 257-58 (1999). Consequently, if Plaintiff cannot establish that Defendants acted without justification, both of Plaintiff's claims for tortious interference fail as a matter of law.

According to Defendants, they are entitled to summary judgment because they complied with the DMCA which authorized them to send FlexNet a notice requesting that it shut down Plaintiff's website. In other words, Defendants assert, acting pursuant to and in accord with the DMCA provides the justification required to defeat Plaintiff's tortious interference claims. Alternatively, Defendants argue, they are entitled to summary judgment because Plaintiff cannot prove damages. According to Plaintiff, Defendants were not justified in sending FlexNet a notice, or at the very least there is a triable issue of fact regarding justification, because Defendants failed to conduct an investigation to determine whether Plaintiff's website actually infringed on any copyrights before sending FlexNet the notice. Moreover, Plaintiff asserts, there is an issue of fact regarding damages that precludes entry of summary judgment in favor of Defendants.

Plaintiff does not cite, and the Court cannot find, any provision in the DMCA which requires a copyright holder to conduct an investigation to establish actual infringement prior to sending a notice to an ISP. Rather, the DMCA only requires a copyright holder to form a good faith belief of an alleged or "claimed" infringement prior to sending an ISP a notice. *See* 17 U.S.C. § 512(c)(3)(A)(v). Here, when Defendants viewed Plaintiff's website in March of 2001, the website contained the following statements: "Join to download full length movies online now! New movies every month"; "Full Length Downloadable Movies"; and "NOW DOWNLOADABLE" followed by graphics for the movies Hannibal, Cast Away and Chocolat among others. There is little question that these statements strongly suggest, if not expressly state, that movies were available for downloading from the site. Indeed, Plaintiff acknowledges, some customers mistakenly thought that movies were available for downloading. Accordingly, the Court finds that Defendants had more than a sufficient basis to form the required good faith belief that Plaintiff's site contained infringing content prior to asking FlexNet to shut down the site. The fact that a further investigation may have revealed that movies could not actually be downloaded does not alter this conclusion.

Moreover, Plaintiff fails to raise a triable issue of fact regarding whether Defendants' notices to FlexNet complied with the provisions of the DMCA. The DMCA requires, among other things, that a notice to an ISP include a statement by the complaining party that it has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent or the law. *See* 17 U.S.C. § 512(c)(3)((A)(v). According to Plaintiff, Defendants' notice did not comply with

this requirement because it affirmatively stated that internetmovies.com was actually violating copyright laws. In making this argument, Plaintiff overlooks paragraph six of Defendants' notice which plainly states, as required by the DMCA, that Defendants had formed a "good faith belief that use of the material in the manner complained of is not authorized by the copyright owners, their respective agents, or the law." Consequently, the Court finds that there is no issue of fact regarding whether Defendants' notice complied with the DMCA.

In sum, Plaintiff fails to raise a genuine issue of material fact with regard to Defendants' compliance with the DMCA and/or Defendants' justification for their actions. Thus, Defendants' motion for summary judgment on counts one and two of Plaintiff's complaint is granted.

2. *Libel and Defamation*

Plaintiff alleges that Defendants defamed him by stating to FlexNet that he was violating copyright laws when in fact he was not. Under Hawaii law, four elements must be established to state a cause of action for defamation: (1) a false and defamatory statement concerning another; (2) an unprivileged publication to a third party; (3) fault amounting at least to negligence on the part of the publisher; and (4) either actionability of the statement respective of special harm or the existence of special harm caused by the publication. *See, e.g., Gonsalves v. Nissan Motor Corp.*, 100 Hawaii 149, 171 (2002); *see also Miracle v. New Yorker Magazine*, 190 F.Supp.2d 1192, 1198 (D.Haw.2001).

The author of an allegedly defamatory statement may raise as a defense to a defamation claim, a qualified

privilege. Whether a communication is privileged is an issue of law to be determined by the court. *Kainz v. Lussier* 4 Haw.App. 400, 405 (Haw.App.1983); *see also Uema v. Nippon Express Hawaii, Inc.*, 26 F.Supp.2d 1241 (D.Haw.1998). A qualified privilege arises when (1) the author of an allegedly defamatory statement reasonably acts in the discharge of some public or private duty, legal, moral or social, and (2) where the publication concerns a subject matter in which the author and the recipients of the publication have a correlative interest or duty. *See, e.g., Kainz,* 4 Haw.App. at 405; *Chow v. Alston*, 2 Haw.App. 480 (Haw.App.1981). Before the defense of qualified privilege can apply, two requirements must be met: (1) the author and recipient must share a common interest in the subject matter of the statement; and (2) the author must have acted reasonably. *See, e.g., Hamm v. Merrick*, 61 Hawaii 470, 473, ftnt. 2 (1980).

Here, the Court finds that Defendants, as the authors, of the allegedly defamatory statement, and FlexNet, the recipient of the statement, share a common interest in the subject matter of the allegedly defamatory statement – i.e., a possible violation of copyright laws. FlexNet, like Defendants, is interested in preventing internet sites hosted on its server from infringing on copyrights, because FlexNet could be liable for such violations under certain circumstances. Further, as previously explained, the Court finds that Defendants acted reasonably in communicating the possible copyright infringement with FlexNet in light the provisions of the DMCA and the statements posted on Plaintiff's website at the time Defendants viewed the site. In sum, the Court finds that Defendants statements to FlexNet were a privileged publication. Consequently, Plaintiff cannot state a claim for defamation against

Defendants, and Defendants motion for summary judgment on the third count of Plaintiff's complaint is granted.

3. *Intentional Infliction of Emotional Distress*

Plaintiff claims that Defendants' intentional actions caused him emotional distress. The elements of an intentional infliction of emotional distress claim are: (1) that the act allegedly causing the harm was intentional; (2) that the act was unreasonable or outrageous; (3) and that the actor should have recognized that the act was likely to result in illness. *See Lee*, 85 Hawaii at 34; *Dunlea v. Dappen*, 83 Hawaii 28 (1996); *see also Miracle*, 190 F.Supp.2d at 1202. Unreasonable or outrageous conduct has been construed to mean conduct without just cause or excuse and beyond all bounds of decency. *Lee,* 85 Hawaii at 34; *see also Miracle*, 190 F.Supp.2d at 1202.

As previously discussed, the Court finds that Defendants' notices to FlexNet pursuant to the DMCA were justified and reasonable. As a result, the act of sending the notices cannot, as a matter of law, be deemed "outrageous" conduct. Thus, Plaintiff cannot maintain a cause of action for the intentional infliction of emotional distress against Defendants. Accordingly, Defendants' motion for summary judgment on the fourth count of Plaintiff's complaint is granted.

CONCLUSION

Defendants' motion for summary judgment on counts one, two three, and four of Plaintiff's complaint is

granted.[3] Further, both parties acknowledge that if Plaintiff cannot maintain his substantive state law causes of action, there is no remaining claim for injunctive relief. Accordingly, Plaintiff's entire complaint is dismissed with prejudice.

IT IS SO ORDERED:

[3] Given the Court's finding that Defendants' actions were justified and reasonable, thus precluding Plaintiff from maintaining any of his substantive state law causes of action, the Court will not address Defendants' additional arguments regarding the damages element of each of the claims.

17 U.S.C.A. § 512 (c), (d), (f), (g)

UNITED STATES CODE ANNOTATED
TITLE 17. COPYRIGHTS
CHAPTER 5 - COPYRIGHT INFRINGEMENT AND REMEDIES

§ 512. Limitations on liability relating to material online

* * *

(c) Information residing on systems or networks at direction of users. -

(1) In general. - A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the storage at the direction of a user of material that resides on a system or network controlled or operated by or for the service provider, if the service provider -

(A)(i) does not have actual knowledge that the material or an activity using the material on the system or network is infringing;

(ii) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(iii) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(B) does not receive a financial benefit directly attributable to the infringing activity, in a case in which the service provider has the right and ability to control such activity; and

(C) upon notification of claimed infringement as described in paragraph (3), responds expeditiously

to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity.

(2) Designated agent. – The limitations on liability established in this subsection apply to a service provider only if the service provider has designated an agent to receive notifications of claimed infringement described in paragraph (3), by making available through its service, including on its website in a location accessible to the public, and by providing to the Copyright Office, substantially the following information:

(A) the name, address, phone number, and electronic mail address of the agent.

(B) other contact information which the Register of Copyrights may deem appropriate.

The Register of Copyrights shall maintain a current directory of agents available to the public for inspection, including through the Internet, in both electronic and hard copy formats, and may require payment of a fee by service providers to cover the costs of maintaining the directory.

(3) Elements of notification. –

(A) To be effective under this subsection, a notification of claimed infringement must be a written communication provided to the designated agent of a service provider that includes substantially the following:

(i) A physical or electronic signature of a person authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(ii) Identification of the copyrighted work claimed to have been infringed, or, if multiple copyrighted works at a single online site are covered by a single notification, a representative list of such works at that site.

(iii) Identification of the material that is claimed to be infringing or to be the subject of infringing activity and that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate the material.

(iv) Information reasonably sufficient to permit the service provider to contact the complaining party, such as an address, telephone number, and, if available, an electronic mail address at which the complaining party may be contacted.

(v) A statement that the complaining party has a good faith belief that use of the material in the manner complained of is not authorized by the copyright owner, its agent, or the law.

(vi) A statement that the information in the notification is accurate, and under penalty of perjury, that the complaining party is authorized to act on behalf of the owner of an exclusive right that is allegedly infringed.

(B)(i) Subject to clause (ii), a notification from a copyright owner or from a person authorized to act on behalf of the copyright owner that fails to comply substantially with the provisions of subparagraph (A) shall not be considered under paragraph (1)(A) in determining whether a service

provider has actual knowledge or is aware of facts or circumstances from which infringing activity is apparent.

(ii) In a case in which the notification that is provided to the service provider's designated agent fails to comply substantially with all the provisions of subparagraph (A) but substantially complies with clauses (ii), (iii), and (iv) of subparagraph (A), clause (i) of this subparagraph applies only if the service provider promptly attempts to contact the person making the notification or takes other reasonable steps to assist in the receipt of notification that substantially complies with all the provisions of subparagraph (A).

(d) Information location tools. – A service provider shall not be liable for monetary relief, or, except as provided in subsection (j), for injunctive or other equitable relief, for infringement of copyright by reason of the provider referring or linking users to an online location containing infringing material or infringing activity, by using information location tools, including a directory, index, reference, pointer, or hypertext link, if the service provider –

(1)(A) does not have actual knowledge that the material or activity is infringing;

(B) in the absence of such actual knowledge, is not aware of facts or circumstances from which infringing activity is apparent; or

(C) upon obtaining such knowledge or awareness, acts expeditiously to remove, or disable access to, the material;

(2) does not receive a financial benefit directly attributable to the infringing activity, in a case in

which the service provider has the right and ability to control such activity; and

(3) upon notification of claimed infringement as described in subsection (c)(3), responds expeditiously to remove, or disable access to, the material that is claimed to be infringing or to be the subject of infringing activity, except that, for purposes of this paragraph, the information described in subsection (c)(3)(A)(iii) shall be identification of the reference or link, to material or activity claimed to be infringing, that is to be removed or access to which is to be disabled, and information reasonably sufficient to permit the service provider to locate that reference or link.

* * *

(f) Misrepresentations. – Any person who knowingly materially misrepresents under this section –

(1) that material or activity is infringing, or

(2) that material or activity was removed or disabled by mistake or misidentification,

shall be liable for any damages, including costs and attorneys" fees, incurred by the alleged infringer, by any copyright owner or copyright owner's authorized licensee, or by a service provider, who is injured by such misrepresentation, as the result of the service provider relying upon such misrepresentation in removing or disabling access to the material or activity claimed to be infringing, or in replacing the removed material or ceasing to disable access to it

(g) Replacement of removed or disabled material and limitation on other liability. –

(1) No liability for taking down generally. – Subject to paragraph (2), a service provider shall not be liable to any person for any claim based on the service provider's good faith disabling of access to, or removal of, material or activity claimed to be infringing or based on facts or circumstances from which infringing activity is apparent, regardless of whether the material or activity is ultimately determined to be infringing.

(2) Exception. – Paragraph (1) shall not apply with respect to material residing at the direction of a subscriber of the service provider on a system or network controlled or operated by or for the service provider that is removed, or to which access is disabled by the service provider, pursuant to a notice provided under subsection (c)(1)(C), unless the service provider –

> **(A)** takes reasonable steps promptly to notify the subscriber that it has removed or disabled access to the material;
>
> **(B)** upon receipt of a counter notification described in paragraph (3), promptly provides the person who provided the notification under subsection (c)(1)(C) with a copy of the counter notification, and informs that person that it will replace the removed material or cease disabling access to it in 10 business days; and
>
> **(C)** replaces the removed material and ceases disabling access to it not less than 10, nor more than 14, business days following receipt of the counter notice, unless its designated agent first receives notice from the person who submitted the notification under

subsection (c)(1)(C) that such person has filed an action seeking a court order to restrain the subscriber from engaging in infringing activity relating to the material on the service provider's system or network.

(3) Contents of counter notification. – To be effective under this subsection, a counter notification must be a written communication provided to the service provider's designated agent that includes substantially the following:

(A) A physical or electronic signature of the subscriber.

(B) Identification of the material that has been removed or to which access has been disabled and the location at which the material appeared before it was removed or access to it was disabled.

(C) A statement under penalty of perjury that the subscriber has a good faith belief that the material was removed or disabled as a result of mistake or misidentification of the material to be removed or disabled.

(D) The subscriber's name, address, and telephone number, and a statement that the subscriber consents to the jurisdiction of Federal District Court for the judicial district in which the address is located, or if the subscriber's address is outside of the United States, for any judicial district in which the service provider may be found, and that the subscriber will accept service of process from the person who provided notification under subsection (c)(1)(C) or an agent of such person.

(4) Limitation on other liability. – A service provider's compliance with paragraph (2) shall not subject the service provider to liability for copyright infringement with respect to the material identified in the notice provided under subsection (c)(1)(C).

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